

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S DOCUMENT NO.556-709-784 D1  
Issued to: Patrick J. Edgell

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2353

Patrick J. Edgell

This appeal has been taken in accordance with Title 46, United States Code 239(g) and 46 CFR 5.30-1.

By order dated 22 February 1983, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana suspended Appellant's seaman's document for three months on twelve months' probation, upon finding him guilty of misconduct. The specification found proved alleges that while serving as Qualified Member of the Engine Department (QMED) on board the SS DELTA NORTE, under authority of the document above captioned, on or about 27 December 1982, Appellant did wrongfully engage in mutual combat with a fellow crewmember.

The hearing was held at New Orleans, Louisiana on 25 January 1983.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence five exhibits and the testimony of two witnesses.

In defense, Appellant offered in evidence two exhibits and his own testimony.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order suspending all documents issued to Appellant for a period of three months on twelve months' probation.

The entire decision was served on 28 February 1983 by certified mail. Appeal was timely filed on 24 March 1983 and perfected on 25 July 1983.

FINDINGS OF FACT

On 27 December 1983, Appellant was serving as Qualified Member of the Engine Department (QMED) on board the SS DELTA NORTE and acting under authority of his document while the vessel was in the port of Salvador, Brazil.

At approximately 2345, Appellant was to assume the twelve to four watch and thereby relieve fellow crewmember Marcos Hill who was complaining the eight to twelve shift was QMED. At this time, the vessel was preparing to maneuver out of the port of Salvador, Brazil. On duty in the engineroom, in addition to the QMED, was the First Assistant Engineer and the Third Assistant Engineer. By custom and practice aboard the SS DELTA NORTE, it was the duty of the QMED on watch, in this instance Hill, to call by telephone signal the quarters of each man on the next watch some forty-five minutes before the relief at midnight. Hill failed to do this.

Appellant had been ashore earlier in the evening and had consumed four large beers. He returned to the vessel at approximately 2100. When Appellant did not receive the telephone signal from Hill he became angry. Appellant suspected that Hill's failure to call him was a deliberate attempt to get him in trouble with the Engineer by causing him to be late in relieving the QMED watch. He had not gotten along well with Hill during this voyage and on at least one prior voyage. Appellant found fault with Hill as a fellow worker and the relationship between the two men had deteriorated to the point where they were not speaking to one another. Notwithstanding the fact that Appellant was not called by the customary signal, Appellant arrived at the engine room on time. Upon arriving, Appellant asked the Third Assistant to log Hill for his failure to call the watch. Appellant used insulting and abusive language in referring to Hill while attempting to have the log entry made. Both the First and Third Engineer next noticed that Appellant and Hill were pushing and shoving each other. Neither of these witnesses saw who started the shoving. Appellant then kicked Hill several times with karate-type blows. The fight was brought to a halt by a blow to Appellant's forehead and hand when Hill swung and hit Appellant with a small metal trash receptacle.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the Administrative Law Judge erred in finding that the fight began with both Appellant and Hill pushing each other simultaneously; in not finding that Appellant acted in self-defense; in concluding that Appellant had engaged in misconduct by wrongfully engaging in mutual combat; and in finding that the log entries describe mutual combat.

APPEARANCE: John H Ryan, Attorney at Law, Maritime Building, Suite 1007, New Orleans, Louisiana 70130.

### OPINION

Appellant, in essence, disagrees with the findings of fact made by the Administrative Law Judge. For the reasons set forth below, the findings of the Administrative Law Judge will not be disturbed.

In deciding whether to uphold the factual findings of an Administrative Law Judge, I have frequently stated:

It is the function of the judge to evaluate the credibility of witnesses in determining what version of events under consideration is correct. Commandant's Appeal Decision 2097 (TODD). The question of what weight is to be accorded to the evidence is for the judge to determine and, unless it can be shown that the evidence upon which he relied was inherently incredible, his findings will not be set aside on appeal. O'Kon v. Roland 247 F. Supp 743 (S.D.N.Y. 1965).

Appeal Decision 2116 (BAGGETT). See also Appeal Decisions 2099 (HOLDER), 2103 (ROYSE), 2302 (FRAPPIER) and 2333 (AYALA).

It has been consistently held: "[t]he administrative reviewing authority will not second guess the judge as to the credibility of witnesses or the weight accorded the various items of evidence." Appeal Decision 1928(VIRDEN). The function of determining credibility properly is vested in the Administrative Law Judge. Appeal Decision 2156(EDWARDS). It is well established that the opportunity of the Administrative Law Judge to observe the demeanor of the witnesses affords him a significant advantage when it becomes necessary to choose conflicting versions of an event. See Appeal Decision 2159 (MILICI).

In reaching his findings, the Administrative Law Judge considered the following facts. By his own admission, Appellant was upset with Hill when he, Appellant, entered the engine room at about 2345. While neither the First Engineer nor the Third Engineer saw who actually started the pushing and shoving they did testify that they observed the two men shoving and pushing each other. The First Engineer testified that when Appellant entered the engine room complaining about not being called by Hill he was "hollering and yelling" and using insulting and abusive language towards Hill. He testified that Appellant was "more the aggressor

than anything else." Although the First Engineer did not see which of the men started the shoving and pushing, he did see Hill return to the throttle board, where he belonged, and then saw Appellant go over to that area. The First Engineer then told Hill to "go ahead and go," meaning that he could go off duty. Hill then started to leave the engine room by going left from the throttle control area to the port side. Shortly thereafter, upon hearing some yelling coming from the port side, he saw Appellant backing away from Hill, who had a small trash can in his hand. As Hill was leaving the engine room at the direction of the First Engineer, Appellant apparently followed Hill over to the port side. Appellant admits that he kicked Hill several times prior to Hill hitting him with the trash can.

Appellant urges that because his testimony is the only direct testimony on the issue, only his testimony can be considered on the question as to who struck the first blow or whether his actions constituted self defense. In speaking to the lack of positive evidence as to which of two parties started a fight that both appeared to be mutually engaged in, it has been consistently held that: "[m]utuality may be inferred from the conduct of the parties, and absent convincing evidence to the contrary, the Administrative Law Judge was free to accept the inference as controlling." Appeal Decision 2230 (SOLLINE). It should be noted that counsel, in his brief, admits that "mutual combat, factually speaking, did occur."

All forms of evidence, as well as the inferences properly drawn therefrom, may be considered by the Administrative Law Judge in resolving factual issues. "Proof of mutual willingness can be inferred from the actions of the parties and need not be proven by direct testimony of an eyewitness that there was an actual mutual agreement to engage in a fight." Appeal Decision 1964 (COLON).

The Administrative Law Judge, however, rejected Appellant's testimony in favor of the strong inference to be drawn from the circumstances. It was neither arbitrary nor capricious for the decision to turn on the credibility or lack of credibility of a witness. The finding of a mutual willingness to engage in combat, as opposed to a finding of self-defense by Appellant, clearly was based upon the testimony of the two engineers as to the actions of the parties both before and during the fight as well as the proper inferences which can be drawn from such evidence. Having rejected the contrary version of self-defense, the Administrative Law Judge was free to accept as controlling the inference that both had, either implicitly or explicitly, agreed to fight each other and did so. Accordingly, the findings of the Administrative Law Judge will not be disturbed.

Appellant contends that the Administrative Law Judge erred in finding that the pertinent log entry admitted into evidence describes unlawful mutual combat. In his brief, he argues that this log entry only supports a finding of having engaged in a mutual fight and not having wrongfully done so. The argument that mutual combat is not necessarily in and of itself misconduct, while supported by the proposition in Appeal Decision 2170 (FELDMAN) that mutual combat is not wrongful per se, ignores the fact that such combat must be properly authorized. An example of such combat would be the staging of a boxing exhibition. See also Appeal Decision 2176 (CARR & REED). The log entry did not state that the mutual combat was an authorized demonstration or match, but rather contained entries which speak in terms of a fist fight breaking out, and that no fine was imposed, but that Appellant was warned that fighting would not be tolerated. While the log entry is neutral as to who started the fight, it is not neutral as to the unauthorized nature of the fight. It was properly admitted into evidence and available to the Administrative Law Judge along with the testimony of the witness.

#### CONCLUSION

There is substantial evidence of a reliable and probative character to support the findings and decision of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

#### ORDER

The order of the Administrative Law Judge dated at New Orleans, Louisiana on 22 February 1983, is AFFIRMED.

B.L. STABILE  
Vice Admiral, U.S. Coast Guard  
VICE COMMANDANT

Signed at Washington, D.C., this 4th day of June 1984.